Supreme Court, U.S.
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No:

In The
Supreme Court of the United States
October Term, 1993

GREGORY P. NOBLE, Sr.,

Petitioner,

v.

REGINALD WILKINSON, Director, Department of Rehabilitation & Corrections, State of Ohio,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Dated: January 21, 1994

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QUESTIONS PRESENTED

1. Whether the failure of a state trial judge to conduct an inquiry of a criminal defendant sufficient to establish that the defendant understands the importance of having an attorney represent him, the risks of self-representation and is able to represent himself renders any waiver of trial counsel invalid under the Sixth Amendment.

2. Whether, if an accused has expressed dissatisfaction with his court-appointed attorney, the Sixth Amendment requires a state judge ascertain the reason for such dissatisfaction before a waiver of trial counsel can be valid.

3. Whether a defendant who is advised that he must either use an assigned attorney whom he believes to be conflicted or represent himself can be said to have waived his right to trial counsel under the Sixth Amendment.

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GREGORY P. NOBLE, SR.,

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& Corrections, State of Ohio,

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Petition For A Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

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Petitioner Gregory P. Noble, Sr. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on October 27, 1993, which affirmed the denial of a writ of habeas corpus, sought upon petitioner's alleged invalid waiver of trial counsel.

OPINIONS BELOW

The unreported opinion of the Sixth Circuit affirming the denial, by the United States District Court for the Northern District of Ohio, of the petition for a writ of habeas corpus is reprinted at pages 1a-3a.[1] The unreported district court's order, granting petitioner a certificate of probable cause to appeal is

[1]References in the form "a " are to the appendix to this petition.

reprinted at page 4a. The unreported opinion and order of the district court, denying the petition for a writ of habeas corpus is reprinted at pages 5a-11a. The unreported report and recommendation of the magistrate judge of the United States District Court for the Northern District of Ohio, recommending the denial of a writ of habeas corpus, is reprinted at pages 12a-33a.

The reported decision of the Supreme Court of Ohio, denying Noble's motion to invoke its jurisdiction to review the judgment affirming his conviction, appears at 56 Ohio St.3d 711, 565 N.E.2d 834 (1991); it is reprinted at page 34a. The unreported majority opinion and decision of the Ohio Court of Appeals for the Eleventh District affirming Noble's conviction is reprinted at pages 35a-47a. The unreported concurring opinion of said court is reprinted at pages 48a-50a. The transcript of the colloquy between Noble and the trial judge of the Ohio Court of Common Pleas for Lake County, upon which it apparently found that Noble had waived trial counsel, appears at pages 51a-55a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2241(a). The judgment of the Sixth Circuit was entered on October 27, 1993.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against

him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In an unrecorded pre-trial conference presided over by a referee, Noble sought to have assigned trial counsel replaced because of a conflict of interest. The referee denied Noble's application and advised him that he could either represent himself or have assigned counsel. Thereafter during a terse colloquy several days later with the trial judge, which is reproduced in full at 51a-55a, he was held to have waived counsel, but was offered the stand-by assistance of the attorney he sought to have replaced.

Noble thereafter went to trial, representing himself with the aid of said assigned counsel and was found guilty by a jury of felonious assault, having a weapon while under a disability, and unlawful possession of a dangerous ordnance. He received an indeterminate sentence of six to fifteen years, which he is currently serving. On appeal, Noble argued, among other things, that his waiver of trial counsel was unconstitutional. The Ohio Court of Appeals for the Eleventh District affirmed

his conviction. *Ohio v. Noble*, Lake App. No. 88-L-13-203 (July 9, 1990) (35a-50a). The Supreme Court of Ohio denied Noble's motion to invoke its jurisdiction to review his conviction. *Ohio v. Noble*, 56 Ohio St.3d 711, 565 N.E.2d 834 (1991)(34a).[2]

On March 23, 1992, Noble petitioned the United States District Court for the Northern District of Ohio for a writ of habeas corpus, pursuant to 28 U.S.C. Section 2254. Jurisdiction was based upon 28 U.S.C. Section 2241.

Noble attacked the constitutionality of his conviction on the ground that it had been obtained in violation of his Sixth Amendment right to counsel. Noble averred that his waiver of trial counsel was not knowing and intelligent because he had neither been aware nor advised of the rights that he would be giving up when waiving. Noble also averred that his waiver was constitutionally infirm because it was the product of erroneous advice given by the trial court, instructing him that he would either have to represent himself at trial or accept the representation of a court-appointed attorney whom he had good cause to believe was disloyal.

The District Court filed an opinion and order dismissing Noble's petition on the merits. *Noble v. Wilkinson*, No. 1:92CV0603 (N.D.Oh. Sept. 15, 1992)(5a-11a). It thereafter granted Noble a certificate of probable cause to appeal. *Id.* (Dec. 18, 1992) (4a). The Sixth Circuit affirmed. *Noble v. Wilkinson*, No. 92-4121 slip op. at 4, (6th Cir. Oct. 27, 1993)(3a).

Noble here seeks review of the Sixth Circuit's decision.

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[2]The Sixth Circuit held that Noble had exhausted his State remedies. *Noble v. Wilkinson*, No. 92-4121 slip op. at 2, at 2a (6th Cir. Oct. 27, 1993).

STATEMENT OF FACTS PERTINENT TO NOBLE'S LACK OF UNDERSTANDING OF HIS RIGHT TO COUNSEL

Following his indictment, Noble retained counsel, who was permitted to withdraw because of an alleged conflict of interest. As Noble had exhausted his funds, new counsel was assigned. However, this attorney was also permitted to withdraw because of a conflict. Another attorney, Edward C. Powers, Esq., was assigned. Noble recognized Powers as a former state prosecutor who, some years earlier, had prosecuted an individual for murder. That individual was tried three times and finally acquitted. Noble was a key defense witness and was threatened by Powers and his co-prosecutor.

Noble promptly sought replacement of Powers because of his concern that Powers would not give him effective representation, but would use this assignment as a way of getting even with Noble. Noble was told by the trial judge's law clerk, who served as the referee for this conference, that he could not have another assigned counsel. He could either go it alone or stay with Powers.

Although there was no transcript of that conference, Noble's 1989 brief on direct appeal from his conviction contained the following respecting a pre-trial conference at which he sought, but was denied, a replacement attorney for Mr. Powers:

> On September 8, 1988, a pretrial hearing was held before Referee Ken Roll with participation by Assistant Prosecutor Brett Plassard, Edward C. Powers, and GREGORY P. NOBLE, SR. GREGORY P. NOBLE, SR. indicated he desired new counsel appointed due to a conflict between GREGORY P. NOBLE, SR. and Edward C. Powers.

> In Lake County Court of Common Pleas Case No. 82-CR-445, *State of Ohio v. Michael C. Baker*, Michael Baker was charged with attempted murder. GREGORY P. NOBLE, SR. was the chief defense witness in the matter which was tried three (3) times due to the jury failing to reach a verdict in the first two (2) trials. The first trial concluded on December 15, 1982 and the second concluded on February 3, 1983. In a Judgment Entry filed on April 1, 1983, Michael C. Baker was found "Not Guilty" of all charges.
>
> The third trial involving Michael C. Baker was tried by Assistant Prosecutors Judd Hawkins and Edward C. Powers. GREGORY P. NOBLE, SR. was the key witness for the defense and there were confrontations inside and outside the courtroom between Assistant Prosecutors and GREGORY P. NOBLE, SR. These confrontations included threats by the prosecution that if GREGORY P. NOBLE, SR. did not testify in the manner the prosecution desired, he would face felony charges.
>
> Referee Roll indicated to GREGORY P. NOBLE, SR. he was not entitled to substitute counsel and GREGORY P. NOBLE, SR. indicated it would be necessary for him to represent himself.

The prosecution's brief in opposition to Noble's direct appeal did not contradict the foregoing quoted material. It was silent on this point and was taken as an admission by the Ohio Court of Appeals, which recited the relevant facts in its opinion, filed on July 9, 1990:

> On September 8, 1988, a pretrial hearing was held before a referee from the Lake County Common Pleas Court, at which time the appellant

> [Noble] indicated he desired yet another new attorney because of a conflict with Edward C. Powers. The referee denied the appellant's [Noble's] request.

Ohio v. Noble, Lake App. No. 88-L-13-203 (July 9, 1990)(37a). Although it denied habeas corpus, the district court accepted the state court record as true, despite an attempt by the state attorney general to contradict it with various affidavits (8a-9a).

Noble, with Powers at his side, thereafter appeared before the trial court. After a colloquy which could not have taken more than two minutes, Noble's waiver of counsel was accepted (51a-55a). The significant aspects of the colloquy follow.

The trial judge began by telling Noble that he had "been advised" "that you wish to represent yourself in this matter". Noble responded, "That's correct, Your Honor."

The trial judge did not state the source of his information or what other information, if any, had been provided to him on this topic. The trial judge did not ask Noble why he wished to represent himself or whether and, if so, why he was dissatisfied with Mr. Powers, his court-appointed attorney. Such an inquiry would have clearly revealed the conflict between Noble and Powers and resulted in the appointment of new counsel, so as to avoid even the appearance of impropriety.

Upon hearing that Noble wanted to represent himself, the trial judge stated:

> "You understand that you have the right to an attorney and the Court has appointed you other attorneys and Mr. Powers is here ready to go forward and you wish to go forward."

Noble responded, "I understand, Your Honor." The trial judge conducted no inquiry as to the extent of Noble's understanding.

It was untrue that other attorneys had been appointed. While Mr. Powers was Noble's third attorney, only one previous attorney had been assigned. Noble had retained his first attorney, who was permitted to withdraw because of a conflict-- his partner's wife was employed by the trial judge. The Public Defender was then appointed, but was permitted to withdraw because of a conflict-- he represented an alleged victim. Thus, Mr. Powers was the second assigned counsel.

The trial judge's mistake is significant here. Noble was entitled to the appointment of an attorney who was not conflicted. Thus, it is unimportant how many attorneys had either been retained or appointed. Noble had done nothing to cause his first two attorneys to be permitted to withdraw on their own motions. Nevertheless, the trial judge seemed annoyed or impatient. It may be that he had concluded that Noble was attempting to stall or manipulate the system. This misconception appears to have been reenforced by the comments of the prosecutor, suggesting that the question of representation "is nothing more than a gambit...."

The transcript preceding the execution of the written form of waiver of counsel contains no warning to Noble of the dangers and pitfalls of self-representation and no inquiry to determine whether Noble had any understanding of the applicable law, the nature of the charges, the possible punishment, the possible defenses or mitigating circumstances, the rules of evidence, or any of the myriad of matters this Court has held that one should know before he can be found to have made an intelligent and knowing waiver.

The trial judge's failure to inform Noble of possible punishment if convicted was significant here. Noble had been offered a plea bargain that if timely accepted would have resulted in

only one year of imprisonment. On the day of trial, Noble attempted to accept this plea offer, but it had been increased to three years. If the trial judge had advised Noble that he could face fifteen years of incarceration if convicted, he might have insisted upon the representation of a court-appointed attorney at trial.

Upon hearing that Noble wanted to represent himself, the trial judge, without exploring his reasons or why he was dissatisfied with his assigned counsel, told Noble:

> "Mr. Powers will sit with you at the counsel table and assist you in whatever way he can. However, it is going to be up to you to voir dire the jury, ask and cross-examine all the witnesses; do you understand?"

Noble responded, not by indicating an understanding, but by asking:

> "can we co-cross-examine the witnesses because I don't want to cross-examine professional police or expert witnesses?"

After eliciting the prosecution's view, the trial judge replied,

> "The court will permit, within reason and within the Court's latitude, the examination by Mr. Powers, but you [Mr. Noble] will be the one to examine to begin with, unless you defer them to Mr. Powers."

Noble's non-responsive reply was, "Thank you, Your Honor."

The remaining few words before the written waiver form was signed and the waiver was accepted by the court were merely matters of housekeeping-- namely, how Noble would invoke Mr. Powers' services at trial and Noble's desire to accept a previous plea offer. Thus, the trial judge cannot be said

to have made any inquiry into his knowledge or understanding of his right to counsel. The trial went forward with Noble and Powers defending.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve an apparent conflict or at least a substantial uncertainty among the Circuits respecting the extent and nature of the inquiry which must be made by a state trial judge, as a constitutional matter, before determining that a defendant has waived his right to counsel. Certiorari should also be granted to halt the erosion of the "protecting duty" that this Court has long imposed upon state trial judges to ensure that waivers of trial counsel are knowing, intentional and voluntary. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938); *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948)(plurality opinion); *Faretta v. California*, 422 U.S. 806, 835 (1975); *Carnley v. Cochran*, 369 U.S. 506, 515 (1962).

Here, Noble appeared before the trial judge with assigned counsel and acknowledged that he wanted to represent himself. The trial judge did not even ask "Why?".

This Court has held:

> . . . this protecting duty imposes a serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive his right does not automatically end the judge's responsibility. To be valid such waiver must be made with an

> apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Von Moltke v. Gillies, 332 U.S. 708, 723 (1948)(plurality opinion).

The First, Second, Sixth, Seventh, Ninth and D.C. Circuits hold that there is no constitutionally mandated inquiry imposed upon state courts. They permit a determination from the record as a whole as to whether a state criminal defendant has validly waived counsel. The instant case takes the extreme position, no meaningful inquiry having been made, and effectively rejects *Von Moltke*, holding (2a):

> a deliberate and searching inquiry by the state court into the reasons for a defendant's decision to represent himself is not required.

In contrast, the Third, Fifth and Eleventh Circuits, although not requiring that a particular set of questions be asked and satisfactory answers obtained, hold that there must be some warning of the risks of self-representation and a minimal inquiry by the trial judge coupled with a record demonstrating the waiver.

The confusion respecting the nature of the inquiry required for the determination of a waiver and whether it is of constitutional magnitude or merely the application of the federal courts' supervisory powers, permeates both state and federal prosecutions. It caused Justice White, joined by Justice Brennan, to dissent from the denial of certiorari in *McDowell v. United States*, 484 U.S. 980 (1987), as follows:

> [s]ince *Faretta [v. California*, 422 U.S. 806 (1975)], lower federal and state courts have sought to arrive at the proper balance between allowing an accused to exercise his right of self-representation, and at the same time, insuring that a waiver of a defendant's right to counsel is only made when "knowing and intelligent" and "with eyes open."
>
> * * *
>
> Because a conflict among the lower courts has emerged concerning the proper application and interpretation of our decision in Faretta, I would grant certiorari. . . .

The D.C. Circuit has found that the uncertainty over the proper application and interpretation of *Faretta*, which concerned Justices White and Brennan, has diluted the standard for waiving counsel announced in *Johnson v. Zerbst*, 304 U.S. 458 (1938). *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982) *cert. denied sub nom. Walker v. United States*, 459 U.S. 853 (1982).

I.

THE SIXTH CIRCUIT'S INSTANT DECISION, WHICH EFFECTIVELY HOLDS THAT NO INQUIRY IS CONSTITUTIONALLY REQUIRED OF A STATE JUDGE BEFORE FINDING THAT THERE HAS BEEN A WAIVER OF COUNSEL, CONFLICTS WITH THE PRECEDENTS OF THIS COURT AND THE THIRD, FIFTH AND ELEVENTH CIRCUITS.

First, petitioner believes that this Court's decisions in *Johnson v. Zerbst*, *id.*; *Von Moltke v. Gillies*, *id.*; *Carnley v. Cochran*, *id.*; and *Faretta v. California*, *id.*, require some form of inquiry and advice by the court before a waiver can be found.

Second, the Third, Fifth and Eleventh Circuits so hold. *Piankhy v. Cuyler*, 703 F.2d 728 (3d Cir. 1983); *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982); *Hance v. Zant*, 696 F.2d 940, 949 (11th Cir. 1983) *cert. denied* 463 U.S. 1210 (1983); *United States v. Chaney*, 662 F.2d 1148, 1152 (5th Cir. 1981).

Piankhy v. Cuyler, 703 F.2d 728 (3d Cir. 1983), reversed the denial of a writ of habeas corpus on facts strikingly similar to those here. Piankhy had on his own sought the representation of the Public Defender, but was denied because he was financially ineligible. He then represented himself at trial. The Third Circuit held that the state trial judge's failure to make an adequate investigation before finding that Piankhy had waived was constitutionally deficient. In doing so, it extended its holding in *United States v. Welty*, 674 F.2d 185 (3d Cir. 1982), a direct appeal case. *Welty* held that the Constitution, not merely the court's supervisory powers, required an investigation by the trial judge before finding a waiver of trial counsel (674 F.2d at 189):

> ... a defendant's waiver of counsel can be deemed effective only where the district court judge has made a searching inquiry sufficient to satisfy him that the defendant's waiver was understanding and voluntary.

The *Piankhy* court reversed, directing that habeas corpus be granted, because (703 F.2d at 731):

> The trial court failed, however, to inform Piankhy of his right to a court-appointed attorney if he could not afford one. That omission is significant in light of Piankhy's attempt to seek representation by the Berks County Public Defender his only source of public representation. Having been previously turned down by that office, Piankhy may not have understood that he had a right, under Pennsylvania

> law, to court-appointed counsel if he was otherwise unable to obtain an attorney.

Accord Hance v. Zant, 696 F.2d 940, 949 (11th Cir. 1983) *cert. denied* 463 U.S. 1210 (1983)("a trial judge must conduct a waiver hearing to make sure that the accused understands the dangers and disadvantages of proceeding pro se").

Although they are direct appeals from federal convictions, *United States v. Edwards*, 716 F.2d 822, 824 (11th Cir. 1983) and *United States v. Chaney*, 662 F.2d 1148, 1152 (5th Cir. 1981) hold that the Constitution, not merely the federal courts' supervisory powers, mandate a judicial inquiry before accepting a waiver of trial counsel. Petitioner recognizes that neither *Edwards* nor *Chaney* explicitly stated that their holding respecting the investigation rested on constitutional grounds; however, their silence compels that conclusion. *See* Justice White's dissent in *McDowell*, 484 U.S. at 980, which interpreted *Edwards* and *Chaney* as constitutional decisions.

The Sixth Circuit's holding that no inquiry is mandated to establish a constitutionally valid waiver of trial counsel is in accord with the First, Second, Seventh, Ninth and D.C. Circuits. *See United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982) *cert. denied sub nom. Walker v. United States*, 459 U.S. 853 (1982); *United States v. Hafen*, 726 F.2d 21, 25 (1st Cir. 1984) *cert. denied* 466 U.S. 962 (1984); *United States v. Tompkins*, 623 F.2d 824, 828 (2d Cir. 1980); *United States v. Trapnell*, 638 F.2d 1016, 1029 (7th Cir. 1980); *United States v. Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982). Thus, there is a significant and long standing conflict among the Circuits that should be resolved.

Here, the state trial judge's failure to conduct any significant inquiry of Noble before accepting his waiver of his right to trial counsel rendered the waiver constitutionally infirm. Noble was offered a plea bargain that would have resulted in one

year of imprisonment, which offer was later raised to three years. Instead, he received a fifteen year sentence. If Noble had been advised that his exposure if convicted was fifteen years of incarceration, he might have insisted upon court-appointed representation. Moreover, as in *Piankhy v. Cuyler*, 703 F.2d 728 (3d Cir. 1983), if Noble had been advised that he had an absolute right to a court-appointed attorney free of animus toward him, he would not have elected to represent himself.

Accordingly, Noble's waiver was not "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). This Court should grant certiorari and reverse.

II.

THE SIXTH CIRCUIT'S DECISION UPHOLDING NOBLE'S WAIVER OF TRIAL COUNSEL DESPITE THE TRIAL COURT'S FAILURE TO INQUIRE INTO THE REASONS FOR NOBLE'S EXPRESSED DISSATISFACTION WITH HIS COURT-APPOINTED ATTORNEY CONFLICTS WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND THE PRECEDENTS OF THIS COURT.

The record plainly established that Noble was dissatisfied with Mr. Powers, his court-appointed attorney, for good cause. The trial court's failure to conduct an inquiry deprived Noble of an opportunity to present this clear conflict with Powers.

The record shows that Noble requested substitute counsel at a pre-trial hearing before a referee but his request was denied; the referee advised Noble that he could either have Mr. Powers or go it alone. The trial court never made any inquiry into Noble's reasons for his dissatisfaction with Mr. Powers; nor did the trial court offer substitute counsel. As matters stood, Noble

had an attorney whom he could not trust. It may have been for this reason that he passed up the plea offers.

Despite the absence of any inquiry into the reasons for Noble's dissatisfaction with his court-appointed attorney and the referee's erroneous advice to him that his only choice was representation by Mr. Powers or proceeding *pro se*, the Sixth Circuit upheld the validity of Noble's waiver. This holding conflicts with decisions of the Third, Seventh, Eighth, Ninth and Tenth Circuits. The Sixth Circuit's holding also conflicts with the precedents of this Court.

Smith v. Lockhart, 923 F.2d 1314, 1321 (8th Cir. 1991), is illustrative of the marked departure the Sixth Circuit's decision is from the decisions of other United States Courts of Appeals. *Smith* granted a writ of habeas corpus to a state prisoner because he proceeded *pro se* when confronted with the option of self-representation or representation by a conflicted court-appointed attorney. *Smith* held:

> Courts have long recognized that the Sixth Amendment contains a correlative right to representation that is unimpaired by conflicts of interest or divided loyalties. Counsel must be willing "to advocate fearlessly and effectively" on behalf of the client. Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case. In general, a conflict exists when an attorney is placed in a situation conducive to divided loyalties and can include situations in which the caliber of an attorney's services "may be substantially diluted."
>
> When a defendant raises a seemingly substantial complaint about counsel, the judge "has an

> obligation to inquire thoroughly into the factual basis of defendant's dissatisfaction." The trial court must make the kind of inquiry that might ease the defendant's dissatisfaction, distrust, or concern. That inquiry should appear on the record.

923 F.2d at 1320 (citations omitted). *See also Gilbert v. Lockhart*, 930 F.2d 1356, 1360 (10th Cir. 1991)("defendant did not knowingly and intelligently waive his right to counsel when his motion for substitute counsel was denied and he was faced with the option of proceeding with unwanted counsel or pro se"); *Sanchez v. Mondragon*, 858 F.2d 1462, 1466 (10th Cir. 1988)(citation omitted)("A choice 'between incompetent or unprepared counsel and appearing pro se' is 'a dilemma of constitutional magnitude'"); *Young v. Lockhart*, 892 F.2d 1348, 1352 (8th Cir. 1989)(where state habeas prisoner was forced to accept the representation of an attorney who had represented him on a previous charge that resulted in conviction or proceed *pro se*, his waiver was invalid); *United States v. Welty*, 674 F.2d 185, 187-88 (3d Cir. 1982)("Where, on the eve of trial, a defendant seeks new trial counsel or opts to represent himself, the district court must engage in two lines on inquiry"; it must inquire into defendant's reasons for wanting substitute counsel and if good cause is lacking, his understanding of his right to counsel before accepting a waiver of counsel).[3]

Moreover, the Sixth Circuit's decision also conflicts with this Court's precedents. Noble could not have "knowingly and intelligently" waived his right to counsel where he was advised that he could either go it alone or accept the representation of a court-appointed attorney who he could have justifiably believed to be disloyal. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Von Moltke v. Gillies*, 332 U.S. 708, 723

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[3]Moreover, when a trial court has erroneously advised an accused of the scope of his right to counsel, any waiver based on that advice is invalid. *See, e.g., United States v. Bohn*, 890 F.2d 1079, 1082 (9th Cir. 1989). The Sixth Circuit's decision conflicts with this Ninth Circuit decision. Here, the trial court erroneously advised Noble that he was not entitled to substitute counsel.

(1948)(plurality opinion); *Carnley v. Cochran*, 369 U.S. 506, 515 (1962).

The trial court's failure to inquire into Noble's dissatisfaction with his conflicted court-appointed attorney, Mr. Powers, and its requirement that Noble either accept the services of Powers or proceed *pro se*, rendered his waiver constitutionally infirm. This Court should grant certiorari and reverse.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on October 27, 1993.

Respectfully submitted,

MAX WILD*
21 La Porte Avenue
Mount Vernon, New York 10552
(914) 667-0685

Attorney for Petitioner
Gregory P. Noble, Sr.

**Counsel of Record*

Dated: January 21, 1994

No. 92-4121
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED OCT 27 1993
LEONARD GREEN, Clerk

GREGORY P. NOBLE, SR.,
Petitioner-Appellant,
v.
REGINALD WILKINSON,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

NOT RECOMMENDED FOR FULL TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

BEFORE: MARTIN and BOGGS, Circuit Judges; and JOINER, Senior District Judge.*

PER CURIAM. Gregory P. Noble, Sr., an Ohio prisoner represented by counsel, appeals the district court's dismissal of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The district court found that Noble voluntarily waived his right to counsel at trial. We affirm.

In 1988, an Ohio jury convicted Noble of felonious assault, having a weapon while under a disability, and unlawful possession of a dangerous ordnance. Each charge contained a firearm specification. Noble received a three-year sentence for the firearm specifications, and an indeterminate term of six to fifteen years on the felonious assault conviction, with a minimum of six years actual incarceration.

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*The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

After exhausting his available state court remedies, Noble filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Noble alleged that the trial court failed to conduct a "searching" inquiry into whether he voluntarily waived his right to counsel. The district court, adopting the report of the magistrate judge, dismissed Noble's petition. In his timely appeal, Noble argues that the district court erred by concluding that he had waived his right to counsel and by concluding that his stand-by appointed counsel cured his defective waiver. We disagree.

We believe that Noble knowingly, voluntarily, and intelligently waived his right to counsel. Contrary to Noble's assertion, a deliberate and searching inquiry by the state court into the reasons for a defendant's decision to represent himself is not required. When reviewing on direct appeal a claim of error regarding a waiver of counsel, we examine the substantive, detailed inquiry required of the district court pursuant to *United States v. McDowell*, 814 F.2d 245, 249-50 (6th Cir.), *cert. denied*, 484 U.S. 980 (1987) (district court shall conduct detailed "model inquiry" before allowing defendant to represent himself). *McDowell* speaks to this Court's supervisory powers, however, and does not apply to how we analyze a habeas corpus action except as a starting point. Needless to say, we would not set a higher standard for habeas than we would for federal defendants. We must therefore review the whole record, as the *McDowell* court did in upholding the defendant's conviction. *Id.* at 249.

In examining the record of the proceedings in this case one is uncertain at first why the petitioner takes the tack he does. Noble was interrogated by the court officer who worked with the trial judge while his court-appointed attorney was present. His employed counsel had been previously dismissed. The only real argument that he now raises is the question of "why" the Common Pleas Judge did not ask him "why he wanted to

dismiss his court-appointed counsel." This begs the question. At that time petitioner seemed intent on trying the case himself, and asked for help from his court-appointed attorney.

Applying the general admonitions of *McDowell*, we think Noble attacks the finding of the Ohio appellate court that he waived counsel. This finding has not been shown to be flawed. The record establishes that Noble requested permission to represent himself, that the trial judge interrogated him as to whether he understood his right to counsel, that counsel was available to represent him or to sit with him, and that he waived his right to counsel. Furthermore, Noble signed a waiver of counsel form. Based upon these facts, Noble clearly and unequivocally asserted his right to self-representation and therefore waived his right to counsel. *See Faretta v. California*, 422 U.S. 806, 835 (1975); *McDowell*, 814 F.2d at 249.

We also conclude that Noble received a fundamentally fair trial. *See Lundy v. Campbell*, 888 F.2d 467, 469-70 (6th Cir. 1989), *cert. denied*, 495 U.S. 950 (1990). Noble's counsel, Edward Powers, conducted the voir dire, a portion of the direct examination, the cross-examination, and the closing arguments. In addition, Powers represented Noble during the selection of jury instructions and at sentencing. Noble's efforts at trial essentially involved some direct questioning, a few objections, and a closing statement. Finally, the record does not establish that Powers' performance was adversely affected by a conflict of interest. These facts demonstrate that Noble received a fundamentally fair trial, because Powers was essentially representing him at all stages of the proceedings. *See Lundy*, 888 F.2d at 469-70. Noble's remaining claims are without merit.

For the foregoing reasons, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

GREGORY P. NOBLE, SR.,
Petitioner,

Case No. 1:92CV0603

v.

REGINALD WILKINSON, Director
Dept. of Rehabilitation
& Corrections, State of
Ohio,
Respondent.

Order
FILED
92 DEC 18 P 6:39

THOMAS D. LAMBROS, CHIEF JUDGE

Petitioner has filed an application for certificate of probable cause to appeal a Judgment denying Petitioner's Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254. Pursuant to Rule 22(b), Federal Rules of Appellate Procedure, and Title 28 U.S.C. § 2254, the Court finds that a certificate of probable cause should be, and hereby is granted.

IT IS SO ORDERED.

Thomas D. Lambros /s
Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO
DATED: 12/18/92

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

GREGORY P. NOBLE, SR.,
Petitioner,

v.

REGINALD WILKINSON, Director
Dept. of Rehabilitation
& Corrections, State of
Ohio,
Respondent.

Case No. 1:92CV0603

MEMORANDUM
OPINION AND
ORDER

THOMAS D. LAMBROS, CHIEF JUDGE

Petitioner, Gregory P. Noble, brought this habeas corpus action pursuant to 28 U.S.C. section 2254 to vacate or set aside his conviction and sentence imposed in September of 1988. Petitioner was charged with felonious assault with a firearm specification, having a firearm while under a disability, and carrying or using a firearm while under the influence of alcohol. Petitioner was also subsequently charged for unlawful possession of a dangerous ordnance and three counts of negligent assault. All indictments were merged for the 1988 trial in Lake County Common Pleas Court.

Petitioner was convicted of one count of felonious assault, with a firearm specification; one count of having a weapon while under disability, with a firearm specification; and one count of unlawful possession of a dangerous ordnance, with a firearm specification. Petitioner was sentenced to a definite three year term on the firearm specification, and an indeterminate term of six to fifteen years on the felonious assault conviction, with a minimum of six years actual incarceration.

Petitioner filed this petition for writ of habeas corpus under 28 U.S.C. section 2254, alleging that his conviction and confinement were obtained in violation of the Sixth Amendment to the United States Constitution. Specifically, petitioner alleges that the waiver of his right to counsel was not knowing and intelligent. It is on this issue that Magistrate-Judge Charles R. Laurie issued a Report and Recommendation ("R&R") dated July 8, 1992, to this Court which recommended that the petitioner's writ for habeas corpus be denied. Pursuant to Local Rule 5:3.1, objections must be filed within ten (10) days from the date the parties receive the Magistrate-Judge's R&R. Petitioner has filed objections to the R&R dated and filed with the Court on July 24, 1992. Respondent did not file any objections.

The petitioner's objections to the Magistrate Judge's R&R are as follows,

> I. The Report Falsely Concludes That "The Petitioner Went Through A Total Of Three Attorneys In The Course Of Defending His Case."
>
> II. The Report Erroneously Finds That The Trial Judge Ruled At The Conclusion Of The Waiver Of Counsel Colloquy That Mr. Powers Would Be Co-Counsel Rather That Stand-By Counsel.
>
> III. The Report Incorrectly Finds That "Until Moments Before Trial Attorney Powers Had Every Reason To Believe That He Would Be Representing Petitioner At Trial As His Sole Counsel."
>
> IV. The Magistrate's Judge's Report And Recommendation Exceeded Its Jurisdictional Authority By Permitting Respondent To File Affidavits To Establish That A State Court Finding Which Satisfied 28 U.S.S. 2254(d) Was Not Supported By The Record.

V. Even If It Was Proper For The Magistrate Judge To Permit Respondent To Challenge The State Court's Factual Finding Under 2254(d), It Is Error For The Magistrate Judge To Resolve The Matter Without Giving Petitioner's Counsel An Opportunity To Cross-Examine Affiants.

VI. The Report Incorrectly Concludes That Petitioner's Waiver Of His Right To Counsel Was Knowingly And Intelligently Made.

VII. The Report Incorrectly Suggests That The Instant Case Should Be Analyzed [sic] The Same As An Ineffective Assistance Of Counsel Case.

Attention has been brought to this Court that needs to remedied before the petitioner's substantive objections can be addressed. The R&R had language questioning the veracity and conduct of petitioner's counsel (July 8, 1992 R&R, p. 10). This Court, upon review of the record is satisfied with the explanation brought forth by petitioner's counsel regarding a quotation of certain statements made by respondent. Petitioner's counsel's quotation was an attempt at irony and not an attempt to misrepresent facts to the Court. It is more than evident that petitioner's counsel has an undivided loyalty to his clients best interest.

DISCUSSION

Petitioner objects to the wording in the R&R that "the petitioner went through a total of three attorneys in the course of defending his case." Further reading of the R&R indicates the role each attorney had with the petitioner's case and therefore puts the wording in context to where it can be understood. In any event the wording is innocuous to this Court. Accordingly, this objection is overruled.

Petitioner objects to the R&R's finding that Mr. Powers acted as co-counsel and not stand-by by counsel. This Court agrees with the Magistrate-Judge's R&R regarding the fact that Mr. Powers did indeed act as co-counsel and not stand-by counsel. At the time of the colloquy before trial, the judge granted petitioner's request to represent himself. However, later in the colloquy petitioner himself requested more than mere assistance from Mr. Powers (July 8, 1992 R&R, Exhibit A, p. 1-2). Petitioner requested Mr. Powers to conduct voir dire and cross-examinations, and in fact Mr. Powers did more than that in conducting direct-examinations, objecting to evidence and questions, and presenting part of a closing argument. The Judge agreed to this type of representation and thus, in fact, agreed to a co-representation as set forth by the standards in Locks v. Sumner, 703 F.2d 403, 407 (9th Cir.) cert. denied, 464 U.S. 933 (1983). This hybrid type of representation gave petitioner meaningful and adequate representation of a type that is not constitutionally required by pro se litigants. Accordingly, this objection is overruled.

Petitioner objects to the finding in the R&R that "until moments before trial attorney Powers had every reason to believe that he would be representing petitioner at trial." The record is not devoid of references of the satisfaction of petitioner regarding the representation of Mr. Powers. In fact, the R&R points to several statements made by petitioner regarding his satisfaction of Mr. Power's work. In addition, the trial was continued until September 19, 1988 for the express purpose of trial preparation. In any event, petitioner is not arguing ineffective assistance of counsel as the basis for his petition to this Court, and thus this objection is overruled.

Petitioner objects that by permitting respondent to file affidavits to establish that a State Court finding which satisfied 28 U.S.C. 2254(d) was not supported by the record exceeded the Magistrate-Judge's jurisdictional authority. Further, petitioner

asserts that if the affidavits are allowed petitioner contends it is error to allow a resolution of the matter without giving petitioner's counsel an opportunity to cross-examine the affiants. Rule 7 governing section 2254 cases stated, "If the petition is not dismissed summarily the judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition." 28 U.S.C. section 2254, Rule 7(a). Furthermore, in part (b) the Rule specifically says affidavits may be submitted and considered part of the record. 28 U.S.C. section 2254, Rule 7(b). The filing of affidavits did not exceed the Magistrate Judge's jurisdictional authority. However, this Court is not relying on the affidavits for any of its review of the record, and the factual determinations of the state court proceedings will be presumed to be correct. Therefore, the objections concerning the affidavits are overruled.

This Court, upon a de novo review, agrees with the R&R regarding whether or not the waiver of the right to counsel by the petitioner was knowing and intelligent. A knowing and intelligent waiver of counsel depends "upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The trial judge in this instance did "investigate as long and as thoroughly as the circumstances of the case before him demand[ed]." Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948). Under the circumstances of this case, the trial court's examination of the petitioner was sufficient. The petitioner had the presence of attorneys who had been assigned to the case, knew of the existence of plea bargains, had previous contact with the judicial system, and knew to ask and receive permission for counsel to conduct certain aspects of the defense. See United States v. Bailey, 675 F.2d 1292, 1302 (D.C. Cir. 1982). Looking at the totality of the circumstances indicates that petitioner was aware of the charges and possible sentences he faced, as well as the dangers of pro se

representation. Thus, the trial judge did investigate the waiver as long and as thoroughly as the case demanded according to the particular facts and circumstances of the case. Therefore, petitioner knew what he was doing and his choice was made with his eyes open. See Adams v. United States ex rel McCann, 317 U.S. 269, 279 (1942). This approach is consistent with the approach set forth in United States v. McDowell, 814 F.2d 245 (6th Cir. 1987), in which the determination of the sufficiency of the waiver is accorded from the record as a whole rather than requiring a deliberate and searching record. McDowell, 814 F.2d at 249. Therefore, upon a de novo review of the Magistrate-Judge's R&R this Court finds that the waiver of the right to counsel executed by the petitioner was knowing, intelligent and voluntary, thus, this objection is overruled.

The final objection the petitioner sets forth is that the Magistrate-Judge incorrectly applied an ineffective assistance of counsel analysis to the petitioner's waiver of counsel claim. This objection is overruled. The Magistrate-Judge correctly applied the law as required for a waiver of counsel claim (July 8, 1992 R&R, p. 12-13). The R&R goes on to discuss the co-counsel representation and the more than adequate job of both petitioner and Mr. Powers in orchestrating the case.

Upon a de novo review of the entire record, this Court is satisfied that the Magistrate-Judge applied the relevant standards of law in finding that, 1) petitioner knowingly and intelligently waived his right to counsel; and 2) that petitioner's interests were adequately and truly represented at trial by co-counsel representation. Therefore, the R&R's conclusions of law are fully adopted and incorporated herein. Accordingly, petitioner's writ for habeas corpus is hereby denied and this case is dismissed and terminated.

IT IS SO ORDERED.

Thomas D. Lambros /s
Thomas D. Lambros
Chief Judge
United States District Court

AT CLEVELAND, OHIO
DATED: September 15, 1992

LAURIE, M.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GREGORY P. NOBLE, SR.,

Petitioner,

v.

REGINALD WILKINSON, Director
Dept. of Rehabilitation & Corrections, State of Ohio

Respondent.

Case No. 1:92CV0603
Chief Judge Thomas D. Lambros

REPORT & RECOMMENDATION

Magistrate Judge Charles R. Laurie

Gregory P. Noble, Sr., filed this petition for writ of habeas corpus through counsel on March 23, 1992. Pursuant to Local Rule 8:2.1(b)(4), this case was automatically referred from the docket of Chief Judge Lambros to the docket of this Magistrate Judge. On April 3, 1992, this Magistrate Judge ordered Reginald Wilkinson, the respondent in this action, to make his return within forty days. On May 18, 1992, the respondent filed his return of writ, and he filed a supplemental return of writ on May 28, 1992, including therein exhibits which he had been

unable to include in the original return. The petitioner requested, and received, an extension of time in which to file a reply, due to the lateness of the filing of the supplemental return. That reply was filed July 2, 1992. After a thorough review of the filings and the law applicable to this case, this Magistrate Judge hereby makes his Report and Recommendation to the Chief Judge.

It is assumed that this Petitioner's petition for writ of habeas corpus is filed under 28 U.S.C. § 2254, although the petitioner does not explicitly say so. Nowhere in the petition is this court cited to the statutory provision under which the petitioner seeks the extraordinary remedy of a writ of habeas corpus. However, it is clear from the Journal entry of conviction and sentence included in the appendix to this petition that the petitioner is "in custody pursuant to the judgment of a State Court." 28 U.S.C. § 2254(a). That statutory section, therefore, must apply. For the sake of judicial economy and reducing the danger of a decision based on form instead of substance, this court will presume that the petitioner filed the petition under 28 U.S.C. § 2254.

I. BACKGROUND

A. Factual History

The conviction at issue here was secured due to a dispute between this petitioner and one Benny Walker in the late night and early morning hours of December 25-26, 1987. The argument arose out of comments made by the petitioner when both he and Walker were in an after hours drinking establishment. Both men had been drinking throughout the night. The petitioner apparently disparaged Walker's deceased brother, and the two men ended up outside the establishment, where the defendant fired a shotgun at Walker, hitting him and possibly several bystanders, as well.

On March 1, 1988, the Lake County Grand Jury returned a three count indictment against this petitioner, charging him

with felonious assault with a firearm specification; having a firearm while under disability, due to the petitioner's prior felony conviction; and carrying or using a firearm while under the influence of alcohol. The petitioner was also subsequently indicted for unlawful possession of a dangerous ordnance and three counts of negligent assault. These indictments were merged for trial.

B. Procedural History

The petitioner went through a total of three attorneys in the course of defending his case. His first attorney was permitted to withdraw on August 8, 1988, because that attorney's partner was married to the trial judge's secretary. The petitioner's second counsel, from the Lake County Public Defender's Office, was permitted to withdraw due to that office's representation of the victim here in another case. The third attorney for this petitioner, Edward Powers, was appointed on September 2, 1988. The petitioner alleges that when he met with Powers, he recognized Powers as a former prosecutor with whom he had an adversarial relationship in another case. The petitioner claims that he made application for yet another attorney at a pretrial conference on September 8, 1988, to one Ken Roll, variously identified both as the trial judge's law clerk and as a referee for the Lake County Court of Common Pleas, but Roll refused this request. According to the trial judge's opening comments at the trial, the petitioner actually stated at the pretrial conference that he wished to represent himself. See Trial Transcript 1-2. The petitioner did not at that time dispute the trial judge's comments.

On September 12, 1988, the dates originally set for trial, the petitioner claims he indicated to the judge's bailiff his desire for substitute counsel; according to the trial judge's opening comments at trial, attorney Powers had instead "requested a continuance in order for him to get an opportunity to prepare and consult with his client." Trial Transcript 2. The trial was

therefore continued for one week to allow the petitioner and Powers to prepare more fully for trial. On September 19, 1988, trial commenced; Prior to the trial, the trial judge had a discussion on the record with the petitioner on the question of self representation. Because of the importance of that colloquy to the resolution of this petition, it is reproduced in full and is attached as Exhibit A to this document. The trial judge then allowed the defendant to go forward with Powers acting as co-counsel. At trial, both Powers and the petitioner questioned witnesses and made objections, and both Powers and the petitioner made closing arguments. At the petitioner's request, Powers conducted voir dire of the jury, and cross examination of the police witnesses and expert witnesses. See: Trial Transcript 3.

The petitioner was convicted of one count of felonious assault, with a fire arm specification; one count of having a weapon while under disability, with a firearm specification; and one count of unlawful possession of a dangerous ordnance, with a firearm specification. The petitioner was sentenced to a definite three year term on the firearm specification, and an indeterminate term of six to fifteen years on the felonious assault conviction, with a minimum six years actual incarceration. Journal Entry in Case Number 88-CR-013, Appendix to Petition for Writ of Habeas Corpus (Petitioner's Appendix) 8-9.

The petitioner appealed his conviction to the Court of Appeals of Ohio, Eleventh Appellate District, raising the following issues:

> 1) The trial court erred to the prejudice of the pro se defendant in holding a felony jury trial without making sufficient inquiry to determine the presence of a knowing, intelligent, and voluntary waiver of the right to counsel.

> 2) The trial court committed reversible error in not requiring enforcement of a plea bargain withdrawn by the State of Ohio on the day of trial after the pro se defendant indicated he accepted the plea bargain.
>
> 3) A defendant who decides on self-representation and is appointed counsel to assist him in his self-representation is entitled to counsel which performs to an objective standard of reasonable representation.
>
> 4) The trial court erred in overruling the defendant's motion for new trial.
>
> 5) The court erred to the prejudice of the defendant in holding a pretrial conference in which a court referee presided.

Appellate Brief of Defendant-Appellant, Gregory P. Noble, Sr. i-iii, Petitioner's Appendix 11-13.

The Eleventh District Court of Appeals, on July 9, 1990, affirmed the petitioner's conviction in all respects. See opinion in State v. Noble, Case Number 88-1-13-203, Petitioner's Appendix 49-63. The petitioner then moved for leave to appeal to the Ohio Supreme Court, offering as grounds for reversal the following issues:

> 1) A waiver of counsel to allow a defendant to proceed pro se cannot be knowing and intelligent unless the trial judge advises the pro se defendant of the nature of the charges, the statutory offenses included within them, the range of all allowable punishments, possible defenses to the charges, circumstances in mitigation of the charges, and all other facts essential to a broad understanding of the matter and presence of standby counsel, co-counsel, or advisory counsel does not remove this burden.

2) Due process requires that a judge preside over a pretrial conference rather than a referee.

Memorandum in Support of Jurisdiction i-ii, Petitioner's Appendix 70-71.

The petitioner's motion for leave to appeal the ruling of the intermediate appellate court to the Ohio Supreme Court was overruled and the appeal dismissed sua sponte on January 11, 1991. See Entry in State v. Noble, Case Number 90-1731, Petitioner's Appendix 106. The petition for writ of habeas corpus was filed in this court on March 23, 1992.

II. PROCEDURAL CONSIDERATIONS

A. Exhaustion

As an initial matter, the respondent argues that the petitioner has failed to exhaust the remedies available to him in state court, and urges this court to dismiss this petition, forcing the petitioner back to state court. The respondent charges first, that the petitioner has raised claims based on facts outside the record which can only be litigated in an Ohio post-conviction proceeding; and second, that the petitioner has failed to present the full substance of the claims raised here to the state courts for their consideration. Both of these points are without merit.

The petitioner's claim that he sought a change of counsel shortly before the trial date and was denied this request by the trial judge's law clerk is not, in fact, supported by the trial record. However, it appears that the respondent is incorrect in his assertion that such claims are only cognizable in post-conviction proceedings under Ohio law; here, the Eleventh District Court of Appeals made at least passing note of that claim when reviewing the petitioner's direct appeal. See opinion in State v. Noble, Case Number 88-1-13-203, at 3, Petitioner's Appendix 51. It is not the function of this court to tell the Ohio courts how to handle matters of Ohio appellate procedure. Under Ohio law, a post-conviction petitioner must raise

issues different from the ones raised in his direct appeal. "Post-conviction collateral action, in the form of habeas corpus coram nobis, or under a unified statutory system of post-conviction relief, is intended to allow judicial review of fundamental issues not considered in a prior proceeding." Keener v. Ridenour, 594 F.2d 581, 589 (6th Cir. 1979) (emphasis added). Here, the issues raised in this habeas corpus petition were raised on direct appeal. There was therefore no need, and indeed no way, for this petitioner to present them in a post-conviction petition. Consequently, review in this court is appropriate.

The respondent's allegation that the petitioner failed to present the substance of his claim to the state appellate courts also is in error. A cursory review of the petitioner's direct appeal to the Eleventh District Court of Appeals clearly demonstrates that the issue of primary importance here -- whether the petitioner knowingly and intelligently waived his right to counsel -- was fully and fairly presented to that court. This petitioner has fully exhausted the remedies available to him under state law.

Additionally, under pertinent Ohio law, the petitioner may now be unable to pursue a remedy in a post-conviction petition; to require him to attempt to do so would be a woeful waste of judicial resources. "[T]he interests of comity, federalism, and wise use of judicial resources will be best furthered by 'addressing the merits forthwith.' . . . [E]ven if [the Petitioner] had not previously exhausted his state remedie, further review in the Ohio courts may now be foreclosed." Cobb v. Perini, 832 F.2d 342, 345 (6th Cir. 1987). Under the rule enunciated by the Supreme Court in Rose v. Lundy, 455 U.S. 509 (1982), this Magistrate Judge finds that this petitioner has, in fact, exhausted the remedies available to him in the state courts.

B. Evidentiary Hearing

Section 2254(d) requires a federal court considering a motion for writ of habeas corpus to presume that findings of fact made by a state court, evidenced by a written finding or opinion of the court, are correct, unless the petitioner establishes or the respondent admits a defect in the state court's findings, such as those listed in that statute. 28 U.S.C. § 2254(d). If that occurs, an evidentiary hearing may be necessary. Prior Supreme Court holdings have stated that if the federal court considering a habeas petition "concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing." Townsend v. Sain, *372* U.S. 293, 318 (1963). The respondent in this case has directed this court's attention to a recent Supreme Court opinion, Keeney v. Tamayo-Reyes, __ U.S. __ , 112 S.Ct. 1715 (1992), wherein that court overruled Townsend on the question of what remedies a habeas corpus petitioner can seek when a procedural default in the state court is alleged. The Supreme Court in Keeney also overruled Townsend on the question of when an evidentiary hearing must be held, stating that the habeas petitioner:

> is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure. We also adopt the narrow exception to the cause-and-prejudice requirement: A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing.

Keeney, __U.S. at __ ,112 S.Ct. at 1721.

In this Magistrate Judge's opinion, the hearing standard enunciated in Keeney is much more stringent and more

demanding on the habeas petitioner than the Townsend standard. Because this new higher standard had not been enunciated at the time this petition was filed, and because this petitioner has had no opportunity to address it, this Magistrate Judge cannot, in all fairness, hold the petitioner to that higher standard.

Even under the less burdensome standard enunciated in Townsend, and the requirements of 28 U.S.C. § 2254(d), however, this Magistrate Judge is not persuaded that an evidentiary hearing is necessary in this case. The findings of fact enunciated by the Eleventh District Court of Appeals are sufficiently complete for this Magistrate Judge to reach a fair and well-informed decision on the merits of this habeas corpus petition. Consequently, no evidentiary hearing is necessary.

C. Petitioner's Traverse

The petitioner filed, on July 2, 1992, a traverse to respondent's return of writ. In that document, the petitioner makes a number of errors that this Magistrate Judge cannot allow to pass.

The petitioner made the following statement in his traverse: "Accordingly, as Respondent states in his own Return of Writ **'[failing to protect the record is [Respondent's] fault; the court does not have an obligation to do so.'** (Respondent's Return of Writ at 8)." Petitioner's Traverse to Respondent's Return of Writ (Traverse) 5. At best, this is an inartful attempt at irony; at worst, it is a material misstatement of the respondent's position. In fact, the return of writ does contain this sentence, with the obviously crucial difference that it is Noble's name that appears where the petitioner has inserted, in brackets, the word "Respondent." As a general rule, the use of quotation marks implies that the meaning of the quoted material has not been materially altered. Here, the petitioner completely reverses the meaning of the respondent's statement, and if the

reader is not a sufficiently suspicious person to turn to the respondent's document for verification, that change in meaning remains unchallenged. This Magistrate Judge is unimpressed by such subterfuge. It reflects badly on the veracity of petitioner's counsel.

In his traverse, the petitioner purports to "reserve[] the right under 28 U.S.C. [§] 2246 'to propound written interrogatories to the affiants, or to file answering affidavits'" after the district court decides whether to grant the petitioner's request for writ of habeas corpus. Traverse 14. It was this Magistrate Judge's impression that the traverse itself was the petitioner's response to the supplemental affidavits filed by the respondent. The petitioner seeks to retain a right of response if this court decides to deny the petition for writ of habeas corpus. He has no such right, and this Magistrate Judge does not choose to extend to him such largesse.

III. GROUNDS FOR BELIEF

The petitioner has raised, in his petition for writ of habeas corpus, three grounds for relief. Because of the unique, free-form structure of this petition, not strictly in compliance with the rules governing habeas corpus cases, those grounds for relief were difficult to discern within the petition, but this Magistrate Judge finally succeeded in locating them:

> 1) The Trial Judge's failure to conduct a searching and deliberate inquiry to determine whether the defendant's waiver of counsel was knowing and intelligent constituted a violation of the defendant's Sixth Amendment right to counsel.
>
> 2) The record in the instant case fails to demonstrate that the defendant understood the dangers and disadvantages of self-representation at the time he made

> his choice and that his waiver was made with eyes open.
>
> 3) The Court's acceptance of the defendant's waiver of his right to counsel without first ensuring that the waiver was knowingly and intelligently made constituted harmful error.

Petition for Writ of Habeas Corpus by a Person in State Custody (Petition) 7-9.

These grounds for relief boil down to essentially one claim: that the petitioner was denied the assistance of counsel to which the Sixth Amendment of the United States Constitution entitles him, without having knowingly and intelligently waived that right, and this denial constituted an error of such grievous dimensions that the petitioner is now entitled to some relief. It is unclear what relief the petitioner desires, because in his petition all he asks for is a hearing on the motion for writ of habeas corpus. Operating on the assumption that what the petitioner desires is an end to his allegedly unconstitutional incarceration, this Magistrate Judge will consider this petitioner's claim.

The first question this Magistrate Judge must answer is whether this petitioner did in fact knowingly and intelligently waive his Sixth Amendment right to assistance of counsel. The trial judge conducted an examination of the petitioner on that question on the record, and the petitioner executed a written waiver of counsel, in which he indicated his desire to represent himself. See Exhibit A to Report and Recommendation; see also Petitioner's Appendix 7. It is clear that a criminal defendant, in order to proceed without counsel, must waive his right to counsel, in an intelligent and competent manner. "While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to

appear upon the record." Johnson v. Zerbst, 304 U.S.458, 465 (1938). As evidenced by the trial transcript here, that determination was in fact made in open court, on the record.

"The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Id. at 464. In other words, the inquiry necessary to determine whether an accused has knowingly and voluntarily waived his right to counsel will be different in each case, depending on the circumstances of that case. Based on the statements of the trial judge, this petitioner's experience in the court system, and the petitioner's own statements, after warnings by the trial judge, that he wished to proceed without benefit of counsel, it is this Magistrate Judge's opinion that the petitioner knowingly and intelligently waived his right to counsel.

It is beyond question that a criminal defendant who wishes to represent himself, rather than being represented by counsel, has that right. See Faretta v. California, 422 U.S. 806 (1975). "[T]he right to self-representation -- to make one's own defense personally -- is thus necessarily implied by the structure of the [Sixth] Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." Id. at 819-820. If the right to assistance of counsel is knowingly waived, then, the defendant has the correlative right to represent himself.

This statement brings this Magistrate Judge to the question at the heart of this petition whether, in fact, the petitioner represented himself to the extent that a waiver of counsel was needed. The respondent answers this question in the negative, and this Magistrate Judge is inclined to agree.

It is obvious that this petitioner did not proceed through his trial with that full representation of counsel most commonly

enjoyed by criminal defendants. But he was not without representation, either. This petitioner was granted by the trial judge the privilege of proceeding with "hybrid representation," a category into which three separate forms of representation by counsel fall, and to which no criminal defendant is constitutionally entitled. See McKaskle v. Wiggins, 465 U.S. 168 (1984).

In the advisory counsel situation, "a pro se defendant is given technical assistance by an attorney in the courtroom, but the attorney does not participate in the actual conduct of the trial." Locks v. Sumner, 703 F.2d 403, 407 (9th Cir. 1983). Such an attorney generally is seen but not heard at trial. A pro se defendant has stand-by counsel when he "is given the assistance of advisory counsel who may take over the defense if for some reason the defendant becomes unable to continue." Id., n.3. Again, absent some dramatic occurrence, this attorney does not have an active role in the accused's defense at trial.

In this petitioner's trial, though, he asked for and received assistance from co-counsel, which requires the most attorney intervention of the three hybrid forms. In this form of hybrid representation, "the attorney may participate directly in the trial proceedings with the defendant (examining witnesses, objecting to evidence, etc.)." Id. An attorney acting in this capacity is clearly more involved in the trial process than an attorney providing either of the two other forms of hybrid representation noted above; the attorney acting as co-counsel can be called upon at a moment's notice to take over the questioning of a single witness, or the defense of the entire case. Even absent such a call, the co-counsel can be expected to cross-examine certain witnesses, make opening and/or closing arguments, and undertake other enormously important functions at trial.

This form of hybrid representation was specifically requested by the petitioner here. Over the objections of the

prosecuting attorney, the trial judge agreed to the petitioner's request that petitioner's court-appointed attorney act as co-counsel, and "co-cross-examine" witnesses with the petitioner. See Exhibit A to Report and Recommendation. This decision of the trial court went over and above what the petitioner was entitled to, and any complaints the petitioner may have now about the representation he received, after the trial court's largess to him, are entitled to no great weight. The petitioner simply has no constitutional right to hybrid representation.

> Faretta does not require a trial judge to Permit 'hybrid' representation of the type [the defendant] was actually allowed. But if a defendant is given the opportunity and elects to have counsel appear before the court or jury, his complaints concerning counsel's subsequent unsolicited participation lose much of their force. A defendant does not have a constitutional right to choreograph special appearances by co' ısel.

McKaskle v. Wiggins, 465 U.S. 168, 183 (1984).

It is now petitioner's position that he distrusted attorney Powers, and wished to have other counsel represent him at trial. As far as this Magistrate Judge can discern from the record in this case, the first time this claim was raised on the record was in the Eleventh District Court of Appeals. The petitioner, in an unfortunate oversight, neglected to include in the Appendix to his petition pages 1-19 and pages 30-31 of his appellate brief in the Eleventh District Court of Appeals. Fortunately, the respondent was more careful, and included all pages of the document with his return of writ. On page 3 of the petitioner's appellate brief, the petitioner noted that he requested new counsel on September 8, 1988, due to a conflict with attorney Powers.

The trial transcript, however, reveals nothing to support this allegation; the affidavits of Ken Roll the presiding officer at the September 8, 1988, conference; Brett Plassard, the assistant prosecuting attorney in the petitioner's case; and the Honorable James Jackson, the judge at the petitioner's trial; also reveal that none of these individuals recall the petitioner requesting at the September 8, 1988, conference or at any other time that attorney Powers be replaced by other counsel. The petitioner has presented neither affidavits nor any other proof that such a request was ever made. Consequently, this Magistrate Judge finds the assertion that petitioner requested new counsel, was rejected at the pretrial conference, and then failed, for some unknown reason, to raise the request on the record at trial, somewhat incredible.

This Magistrate Judge also finds significant the fact that until moments before trial, attorney Powers had every reason to believe that he would be representing the petitioner at trial as his sole counsel. It was only at the time set for trial to begin that the petitioner made his request to proceed with hybrid representation, with Powers acting as co-counsel to the petitioner. Consequently, the petitioner's assertion that the procedure by which the trial judge arrived at the hybrid representation scheme "placed absolutely no responsibility on Mr. Powers to prepare the case for trial," is patently absurd. See Petition at 31. Attorney Powers bore an carried out the same responsibility to prepare the petitioner's case for trial as any attorney appointed or retained to fully represent a criminal defendant. Specific defects in the co-counsel representation by the petitioner and Powers alleged in this petition do nothing to suggest any failure by Powers. As noted in the context of a claim of ineffective assistance of counsel, "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence . . ." Strickland v. Washington, 466 U.S. 668, 689 (1984). A thorough review of the trial transcript

here, with the proper deference to the efforts of defense co-counsel, reveals that attorney Powers did a fine and thorough job of representing the interests of this petitioner, and demonstrated a full knowledge and understanding of the case and its theory.

In addition, the petitioner himself did a superior job of representing himself. The petitioner on numerous occasions made objections which were sustained by the trial judge, and forced telling concessions from some of the state's witnesses on cross-examination. The trial judge noted, at the petitioner's sentencing hearing, "You did a pretty good job, Mr. Noble, in fact, a very admirable job representing yourself with the assistance of Mr. Powers. You are knowledgeable and you are articulate." Transcript at 532. This coupled with the able assistance of attorney Powers leads this Magistrate Judge to believe that the petitioner's interests were well and truly protected.

Finally, this Magistrate Judge notes that the petitioner himself expressed on numerous occasions his satisfaction with the representation provided by attorney Powers and himself. In his closing argument -- which the trial judge permitted him to make, in addition to allowing attorney Powers to argue -- the petitioner said, "I'm not up here to summate, my competent counsel will do this." Transcript at 466. The petitioner also noted in his closing that "I received a fair, impartial trial. There ain't no doubt in my mind about that." Id. And finally in his closing argument, the petitioner said, "Then, I'd like to thank Mr. Powers for sittin' with me throughout this entire trial because had he not [been] doin' his homework, I would have failed in proving my innocent here today. There is no way I could have done without Mr. Powers, simply because I'm not ept, educated in the law and mannerisms of the Courtroom, and what have you." Id. at 467.

At his sentencing hearing, the petitioner noted his continuing reliance on attorney Powers, stating that "I believe that Mr. Powers speaks for me." Transcript at 522. When the trial judge inquired of the petitioner, "Do you wish Mr. Powers to represent you on appeal?" the petitioner responded, "Yes, I do, Your Honor." Transcript at 528.

All in all, the foregoing does not paint a picture of a criminal defendant who endured a trial in which he was forced to represent himself, despite his lack of expertise or desire to do so, or in which he had biased, ineffective or unwanted counsel thrust upon him. This petitioner pronounced himself well satisfied with his representation at the time it was rendered; this Magistrate Judge is disinclined to second-guess that pronouncement at this late date.

IV. CONCLUSION

This Magistrate Judge respectfully recommends that the petition for writ of habeas corpus submitted by Gregory P. Noble, Sr., be denied.

DATED: 7-8-92

Charles R. Laurie /s

CHARLES R. LAURIE
United States Magistrate Judge

V. OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order. See United States v. Walters, 638 F.2d 947 (6th Cir. 1981). See also

Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986).

VI. CERTIFICATION

I hereby certify that a copy of the foregoing instrument has been forwarded to Ronald K. Noble, New York University Law School, 40 Washington Square South, Room 431, New York, New York, 10012 and Ronald L. Cappellazzo, Hyatt Legal Services, 2337 Romig Road, Akron, Ohio, 44322, counsel for Petitioner and Scott A. Bravi, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio, 43266-0410, counsel for Respondent, this 8th day of July, 1992, by regular United States Mail.

Charles R. Laurie /s

Charles R. Laurie
United States Magistrate Judge

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

THE STATE OF OHIO,

Plaintiff,

v.

GREG PAUL NOBLE,

Defendant.

Case No. 88CR 013
88CR 209

Judge James W. Jackson

PARTIAL TRANSCRIPT OF RECORD
VOLUME I

THE COURT: As I understand, I have been advised, Mr. Noble, that you wish to represent yourself in this matter?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: You understand you have the right to have an attorney, and the Court has appointed you other attorneys, and Mr. Powers is here ready to represent you, and you wish to go forward?

THE DEFENDANT: I understand, Your Honor.

THE COURT: Pardon me?

MR. NOBLE: I understand.

THE COURT: Mr. Powers will sit with you at the counsel table and assist you in whatever way he can. However, it is going to be up to you to voir dire the Jury, ask and cross-examine all the witnesses; do you understand?

THE DEFENDANT: Your Honor, can we co-cross-examine the witnesses, because I don't want to cross-examine professional police witnesses or expert witnesses?

THE COURT: Any comment from the State?

MR. PLASSARD: Well, Your Honor, the State, as far as comments, we prepared the case and we were unsure as to who was going to be representing the Defendant; whether he was going to represent himself.

I think this is all nothing more than a gambit, as far as the Defendant is concerned. If he wants to represent himself, he should represent himself on all the witnesses.

THE COURT: Well, I disagree. The Court will permit, within reason and within the Court's latitude, the examination by Mr. Powers, but you will be the one that will examine, to begin with, unless you defer them over to Mr. Powers.

THE DEFENDANT: Thank you, Your Honor.

MR. POWERS: Your Honor, may I just indicate in discussing with Mr. Noble, he's also indicated that he wishes to have me conduct the voir dire proceedings, also.

THE COURT: All right.

MR. POWERS: I don't know whether he, during the course of the proceedings, or during the course of voir dire, will wish to question any of the potential jurors. I think since he's waived his right to counsel, he won't have --

THE COURT: You have effectively waived your right to counsel, you understand that?

THE DEFENDANT: I understand, Your Honor.

THE COURT: You will sign a document to that effect before we proceed.

MR. POWERS: M. Noble's willing to plead to the offer, that is, plead to the initial offer that was offered by the Prosecutor.

The prosecutor has indicated that the initial offer is no longer available. The initial offer was plea to felony four, possession of a dangerous ordinance, or weapon under disability, without the firearms specification, or the prior offense of violation specification.

Mr. Noble has indicated that he's be willing to enter a plea to one of those charges.

The prosecutor has indicated since this is the day of trial, that that offer is not still available.

MR. PLASSARD: The State has indicated that the offer of a plea of a F-4 is not available. The offer that is now available is a F-4 with a specification plea to a prior offense of violence, but excluding the firearm specification with the three years actual incarceration, which I think is reasonable on the day of trial.

THE COURT: The Court will adjourn and we will have you sign the waiver of counsel.

EXHIBIT A

THE SUPREME COURT OF OHIO

Filed
COURT OF APPEALS
JAN 11 1991
ANDY J. TOTIN
CLERK OF THE COURT
LAKE COUNTY, OHIO

Common Pleas Ct.
88 CR 209

1990 TERM

To wit: December 26, 1990

State of Ohio
Appellee,

Case No. 90-1731

v.

ENTRY

Gregory P. Noble, Sr.,
Appellant.

Upon consideration of the motion for leave to appeal from the Court of Appeals for Lake County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, Affidavit of Poverty filed.

(Court of Appeals No. 88L13203)

Thomas J. Moyer /s
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS
ELEVENTH CIRCUIT
LAKE COUNTY, OHIO

FILED
COURT OF APPEALS
JULY 9 1990
ANDY J. TOTIN
CLERK OF THE COURT
LAKE COUNTY, OHIO

JUDGES

HON. JUDITH A. CHRISTLEY, P.J.,
HON. JOSEPH E. MAHONEY, J.,
HON. DONALD R. FORD, J.

CASE NO. 88-L-13-203
OPINION

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

GREGORY P. NOBLE, SR.,

Defendant-Appellant.

CHARACTER OF PROCEEDINGS:

Criminal Appeal from Lake
County Court of Common Pleas
Case Nos. 88 CR 013, 88 CR 209

JUDGMENT: Affirmed

ATTY. STEVEN C. LATOURETTE
COUNTY PROSECUTOR

ATTY. ARIANA E. TARIGHATI
ASSISTANT COUNTY PROSECUTOR
Lake County Courthouse
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P.O. Box 490
Painesville, Ohio 44077
(For Plaintiff-Appellee)

ATTY. JAMES K. FARRELL, JR.
2481 North Ridge Road
Painseville, Ohio 44077-4848
(For Defendant-Appellant)

MAHONEY, J.

On March 1, 1988, the appellant, Gregory P. Noble, Sr., was indicted by the Lake County Grand Jury for felonious assault with a firearm specification, having a weapon while under disability with a firearm specification, and carrying or using a firearm while under the influence of alcohol. On June 20, 1988, the appellant was also indicted for unlawful possession of a dangerous ordnance and three counts of negligent assault. The two cases against the appellant were subsequently consolidated.

On August 12, 1988, Michael A. Cicconetti was permitted to withdraw as appellant's counsel. The trial court then appointed the Lake County Public Defender to represent the appellant. On September 2, 1988, because of a conflict with the Public Defender's Office, a new attorney, Edward C. Powers, was appointed to represent the appellant; and the matter was set for trial on September 12, 1988.

On September 8, 1988, a pretrial hearing was held before a referee from the Lake County Common Pleas Court, at which time the appellant indicated that he desired yet another new attorney because of a conflict with Edward C. Powers. The referee denied the appellant's request. Also at the September 8 pretrial, the appellant alleges that a plea arrangement was offered by the State of Ohio which he did not accept.

On September 12, 1988, the scheduled trial date, the matter was continued until September 19, 1988. The plea offer to the appellant was reaffirmed at that time.

On September 19, 1988, prior to trial, the appellant alleges that he was prepared to plead guilty in accordance with the plea offer that had previously been offered to him. The prosecutor indicated that the offer was no longer available and the appellant would now have to plead to a greater charge. The appellant rejected the latest offer and the case proceeded to trial.

The appellant represented himself, with Edward C. Powers being appointed to assist him in his defense throughout the trial. Powers performed the voir dire examination, cross-examined some of the state's witnesses, directly examined the appellant, and participated in part of the closing statement.

The appellant was found guilty of felonious assault, having a weapon while under disability, and unlawful possession of a dangerous ordnance. All three counts included firearm specifications.

On September 29, 1988, the appellant was sentenced to an indefinite term of six to fifteen years, with the minimum of six years to be served as actual incarceration, plus three years of actual incarceration for the firearm specification.

On October 5, 1988, the appellant filed a motion for a new trial. The trial court denied said motion on October 28, 1988.

The appellant timely filed a notice of appeal from his conviction, setting forth the following assignments of error.

> "1. The trial court erred to the prejudice of the pro se defendant in holding a felony jury trial without making sufficient inquiry to determine the presence of a knowing, intelligent, and voluntary waiver of the right to counsel.
>
> "2. The trial court committed reversible error in not requiring enforcement of a plea bargain withdrawn by the State of Ohio on the day of trial after the pro se defendant indicated he accepted the plea bargain.
>
> "3. A defendant who decides on self-representation and is appointed counsel to assist him in his self-representation is entitled to counsel which performs to an objective standard of reasonable representation.
>
> "4. The trial court erred in overruling the defendant's motion for new trial.
>
> "5. The court erred to the prejudice of the defendant in holding a pretrial conference in which a court referee presided."

In his first assignment of error, the appellant argues that the trial court erred in conducting the trial without first obtaining a knowing, intelligent, and voluntary waiver of counsel from him.

Crim. R. 44 states, in pertinent part:

> "**(A) Counsel in Serious Offenses.** Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial

> appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.
>
> "***
>
> "**(C) Waiver of Counsel.** Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22. In addition, in serious offense cases the waiver shall be in writing.
>
> "***"

Crim. R. 2 indicates that any felony is a serious offense.

The Ohio Supreme Court has addressed the responsibility of the trial court to comply with Crim. R. 44. In State v. Gibson (1976), 45 Ohio St. 2d 366, the court held:

> "In order to establish an effective waiver of right to counsel, the trial court must make sufficient inquiry to determine whether defendant fully understands and intelligently relinquishes that right." Id. at syllabus two.

In addition, the particular facts and circumstances surrounding each case must be examined to determine if an intelligent waiver of counsel has occurred. This includes looking at the background, experience, and conduct of the defendant. Johnson v. Zerbst (1938), 304 U.S. 458.

In the present case, it is clear that the trial court made sufficient inquiry to determine that the appellant was fully aware of his right to counsel which he was relinquishing and the consequences of doing so. The trial court questioned the appellant,

who was present in court with attorney Edward C. Powers, in the following manner:

"***

"THE COURT: *** As I understand, I have been advised, Mr. Noble, that you wish to represent yourself in this matter?

"THE DEFENDANT: That's correct, your Honor.

"THE COURT: You understand you have the right to have an attorney, and the Court has appointed you other attorneys, and Mr. Powers is here ready to represent you, and you wish to go forward?

"THE DEFENDANT: I understand, Your Honor.

"THE COURT: Pardon me?

"MR. NOBLE: I understand.

"THE COURT: Mr. Powers will sit with you at the counsel table and assist you in whatever way he can. However, it is going to be up to you to voir dire the Jury, ask and cross-examine all the witnesses; do you understand?

"***

"THE COURT: You have effectively waived your right to counsel, you understand that?

"THE DEFENDANT: I understand, Your Honor.

"THE COURT: You will sign a document to that effect before we proceed.

"***"

At that point in the proceedings, the appellant admits to sign a waiver of counsel which stated:

> "I, GREG NOBLE, do hereby waive my right to my court appointed counsel in the within case. It is my desire to represent myself in this matter."

It is undisputed that the appellant made a waiver of counsel in open court that was recorded and put in writing. Additionally, the appellant had previously been convicted of a felony, which suggests that he had some knowledge of the justice system. United States v. Bailey (C.A.D.C. 1982), 675 F. 2d 1292. Further, the appellant had been represented by three different attorneys during the course of his case, which indicates that he must have known the gravity of the charges against him. The fact that the appellant had been offered two separate plea bargains shows that he was aware of the possible sentences he faced. From the circumstances surrounding the present case, it is apparent that the appellant made an intelligent waiver of his right to counsel.

It is also important to note that the appellant was assisted throughout the trial by attorney Edward C. Powers. Powers, who was appointed to sit at the counsel table and assist the appellant, performed the voir dire examination, cross-examined many of the state's key witnesses, performed the direct examination of the appellant, and gave part of the closing argument.

For the foregoing reasons, it is apparent that the trial court made a sufficient inquiry to determine that the appellant made a knowing, intelligent, and voluntary waiver of the right to counsel.

The record reveals that truly the appellant had the benefit of representing himself during the course of the trial, when he felt it was to his benefit, and then allowing attorney Powers to examine and cross-examine witnesses when he decided that was

in his best interest. The record also indicates that the questioning of witnesses by the appellant and attorney Powers was conducted in a very efficient and in-depth manner, resulting in the eliciting of all the information that each witness possessed.

The appellant's first assignment of error is without error.

In his second assignment of error, the appellant asserts that the trial court erred in not requiring enforcement of the original plea bargain offered to him when he indicated on the day of the trial that he wished to accept it.

The appellant relies on Cooper v. United States, (C.A. 4, 1979), 594 F. 2d 12, wherein the court stated:

> "*** under appropriate circumstances--which we find here--a constitutional right to enforcement of plea proposals may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." Id. at 18.

Cooper, supra, has since been rejected in Government of Virgin Islands v. Scotland (C.A. 3, 1980), 614 F. 2d 360, absent detrimental reliance by the defendant. State v. Witlicki (June 18, 1982), Lake App. No. 8-245, unreported.

The two other cases cited by the appellant, United States v. Smith (S.D. Tex. 1986), 648 F. Supp. 495, and United States v. Benson (C.A. 8, 1988), 836 F. 2d 1133, are inapplicable to the present case because they are factually distinguishable. In Smith, the government tried to withdraw its consent to plea agreements after the defendant had already accepted them. In Benson, the defendant (appellant) on his appeal requested that the judgment and commitment order of the trial court be vacated and that he be resentenced by a different trial judge. The gist of Benson's complaint concerned his claim that the

government failed to accurately convey his prior cooperation with the government in other matters.

In the case sub judice, on the day of the trial the appellant attempted to accept a plea bargain that had been offered to him over a week earlier. Since he had rejected the offer when it was first offered to him, it was unrealistic for him to expect that the offer was still open. Without indicating that he intended to accept the prosecutor's offer, there could be no detrimental reliance. Further, the appellant had the option of accepting the state's new plea bargain if he wanted to avoid a trial, or he could have requested a continuance.

In conclusion, the trial court did not err in failing to enforce the original plea offered by the state. The appellant's second assignment of error is without merit.

In his third assignment of error, the appellant argues that, even though he represented himself at trial, he was entitled to effective assistance from the court-appointed counsel; and that the assistance he received fell below an objective standard of reasonable representation. Specifically, the appellant contends that his appointed counsel should have pursued the affirmative defense of intoxication.

Defense counsel is given great latitude in matters of trial strategy. State v. Smith (1985), 17 Ohio St. 3d 98. In hindsight, it is easy to second-guess a particular strategy, but effectiveness of counsel cannot be based on the outcome of the trial. As the United States Supreme Court stated in Strickland v. Washington (1984), 466 U.S. 688, 689:

> "***It is all too tempting for a defendant to second-guess (sic) counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or

> omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134, *** (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'***"

In the case sub judice, the appellant denied possessing or firing a weapon on the night in question and claimed that the witnesses were lying. The defense strategy was to deny that the appellant inflicted harm on the victims. The appellant himself admitted in his own opening argument that he was guilty of being drunk and disorderly; however, he denied possessing a weapon. He claimed that it must have been somebody else who fired the shots that injured the victims. While the defense strategy failed in this case, it did not amount to ineffective assistance of counsel.

The appellant's third assignment of error is not well taken.

In the fourth assignment of error, the appellant asserts that the trial court erred in overruling his motion for a new trial.

Specifically, the appellant argues that he was entitled to a new trial because the prosecution was permitted to introduce into evidence photographs of his clothing which were not supplied in discovery when identification of the perpetrator was the central issue at trial.

The record from the proceedings in trial court reveals, however, that the appellant failed to object to the admission of said photographs, based on violation of discovery rules, when they were introduced into evidence. The appellant objected to their admission, but only because the state allegedly failed to lay a proper foundation. The following exchange occurred:

"***

"MR. POWERS: I object to the picture of the clothes hanging in the police station. I don't recall Officer Miller testifying, he never testified about it. I assume he's the one that took it from the Defendant.

"MR. PLASSARD: As long as they fairly and accurately depict what he was wearing on the night in question.

"THE COURT: They have testified that that was what he was wearing.

"MR. POWERS: The others did. There is no testimony from the officer that that clothing was taken from him when he was processed.

"THE COURT: That is what he was wearing on the night in question.

"MR. POWERS: I take it that my objection is getting overruled?

"THE COURT: The objection will be overruled.

"***"

It is clear that the appellant failed to object pursuant to Crim. R. 16(E) (3).

By failing to properly object in the trial court, the appellant has waived his right to object on appeal. The Ohio Supreme Court has stated:

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of State v. Glaros, 170 Ohio St. 471, approved and followed.)" State v. Williams (1977), 51 Ohio St. 2d 112, paragraph one of the syllabus.

Appellant's fourth assignment of error is without merit.

In his fifth assignment of error, the appellant contends that the trial court erred in holding a pretrial conference at which a court referee presided.

> "*** At any time after the filing of an indictment, information or complaint the court may, upon its own motion or the motion of any party, order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon.*** The court shall not conduct pretrial conferences until the defendant is represented by counsel."

It is clear that under Crim. R. 17.1 the trial court has broad discretion in deciding whether to conduct a pretrial conference. There is nothing in the rule, however, that precludes the court from appointing a referee to preside over such a conference. The record is devoid of any memorandum filed by the referee or the trial judge of the matters agreed upon. However, the appellant has failed to show or even suggest how he might have

been prejudiced by having a referee conduct the pretrial in question.

The appellant's fifth assignment of error is without merit.

For the reasons stated herein, the appellant's assignments of error are found to be without merit, and the judgment of the trial court is affirmed.

Joseph E. Mahoney /s

JUDGE JOSEPH E. MAHONEY

CHRISTLEY, P.J., concurs,

FORD, J., concurs with
concurring opinion

COURT OF APPEALS
ELEVENTH DISTRICT
LAKE COUNTY, OHIO

FILED
COURT OF APPEALS
JULY 9 1990
ANDY J. TOTIN
CLERK OF COURT
LAKE COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

GREGORY P. NOBLE, SR.

Defendant-Appellant

JUDGES

HON. JUDITH A. CHRISTLEY, P.J.,
HON. JOSEPH E. MAHONEY, J.,
HON. DONALD R. FORD, J.

CASE NO. 88-L-13-203

CONCURRING OPINION

FORD, J.

I concur with the majority's resolution of this cause. However, I write separately to further elucidate upon the first assignment of error.

The majority summarily concludes that "the trial court made a sufficient inquiry to determine that appellant made a knowing, intelligent, and voluntary waiver of the right to counsel. In Von Moltke v. Gillies (1948) 332, U.S 708, the Supreme Court established the standard to determine whether the waiver is valid.

> "'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Von Moltke, supra, at 723-24.

Interpreting Von Moltke, the Tenth Circuit Court of Appeals in United States v. Padilla (C.A. 10, 1987), 819 F. 2d 952 at 959, held:

> "*** [T]hat the trial judge should conduct an inquiry sufficient to establish a defendant's knowledge and understanding of the factors articulated in *Von Moltke*. No precise litany is prescribed. Rather, the court should question the defendant as long and as thoroughly as the circumstances of the case demand ***." (Citations omitted).

Although the trial judge's colloquy fails to comport with the dictates of Von Moltke and Padilla, supra, or the complete Ohio Jury Instruction boiler plate pronouncement on this issue, the rationale expressed in Locks v. Sumner (C.A. 9, 1983), 704 F. 2d 403 negates any prejudicial shortfalls in this cause.

In Sumner, supra, the court analyzed the distinctions between advisory counsel and co-counsel.

> "Importantly, co-counsel and advisory counsel are terms that have gained distinct meanings. Advisory counsel is generally used to describe the situation when a pro se defendant is given technical assistance by an attorney in the courtroom, but the attorney does not participate in the actual conduct of the trial. In the co-counsel situation, the attorney may participate directly, in the trial proceedings with the defendant (examining witnesses, objecting to evidence, etc.)." Id. at 407.

Attorney Powers' role here, as aptly noted by the appellee, was in reality, as the record discloses, that of co-counsel and not that of advisory counsel. This difference amounts to more than a form distinction as with such representation we find appellant was represented by counsel even in light of the executed waiver. Thus, no reversible error obtains under appellant's first assignment of error.

Donald R. Ford /s

JUDGE DONALD R. FORD

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

THE STATE OF OHIO,

Plaintiff,

-vs-

GREG PAUL NOBLE

Defendant.

CASE NO. 88CR 013
88CR 209

TRANSCRIPT OF RECORD
VOLUME I

APPEARANCES:
On Behalf of the State of Ohio:

BRETT PLASSARD
Assistant Prosecuting Attorney

On Behalf of the Defendant:

EDWARD POWERS
Attorney at Law

PROCEEDINGS

The following proceedings were had before the voir dire selection, out of the presence of the prospective jurors:

THE COURT: Let the record reflect that this is case numbers 88CR 013 and 88CR 209, which has been consolidated in 88CR 013, The State of Ohio v. Greg Paul Noble.

For the record, on June 24, 1988, in case number 88CR 209, the Defendant was arraigned. The case was transferred to me on July 18, 1988, and a Jury trial was scheduled for August 15.

Prior to that the Defendant was represented by attorney James Farrell. On August 8, 1988, a motion to continue was granted; motion to withdraw as counsel by Mr. Farrell was filed and granted.

The Public Defender was appointed, and a Jury trial was set for September 20, 1988. On September 1, 1988, the Public Defenders Office advised the Court they represented a co-Defendant.

The Court appointed Edward Powers on September 8, 1988, a pre-trial was held at which time the Defendant advised that he wished to represent himself.

On September 12, 1988, last week, the case was ready to go forward when new defense counsel, Mr. Powers, requested a continuance in order for him to get an opportunity to prepare and consult with his client.

This case has been rescheduled for today, September 19, 1988.

THE COURT: As I understand, I have been advised, Mr. Noble, that you wish to represent yourself in this matter?

THE DEFENDANT: That's correct, Your Honor.

THE COURT: You understand you have the right to have an attorney, and the Court has appointed you other attorneys, and Mr. Powers is here ready to represent you, and you wish to go forward?

THE DEFENDANT: I understand, Your Honor.

THE COURT: Pardon me?

MR. NOBLE: I understand.

THE COURT: Mr. Powers will sit with you at the counsel table and assist you in whatever way he can. However, it is going to be up to you to voir dire the Jury, ask and cross-examine all the witnesses; do you understand?

THE DEFENDANT: Your Honor, can we co-cross-examine the witnesses, because I don't want to cross-examine professional police witnesses or expert witnesses?

THE COURT: Any comment from the State?

MR. PLASSARD: Well, Your Honor, the State, as far as comments, we prepared the case and we were unsure as to who was going to be representing the Defendant; whether he was going to represent himself.

I think this is all nothing more than a gambit, as far as the Defendant is concerned. If he wants to represent himself, he should represent himself on all the witnesses.

THE COURT: Well, I disagree. The Court will permit, within reason and within the Court's latitude, the examination by Mr. Powers, but you will be the one that will examine, to begin with, unless you defer them over to Mr. Powers.

THE DEFENDANT: Thank you, Your Honor.

MR. POWERS: Your Honor, may I just indicate in discussing with Mr. Noble, he's also indicated that he wishes to have me conduct the voir dire proceedings, also.

THE COURT: All right.

MR. POWERS: I don't know whether he, during the course of the proceedings, or during the course of voir dire, will wish to question any of the potential jurors. I think since he's waived his right to counsel, he won't have --

THE COURT: You have effectively waived your right to counsel, you understand that?

THE DEFENDANT: I understand, Your Honor.

THE COURT: You will sign a document to that effect before we proceed.

MR. POWERS: Mr. Noble's willing to plead to the offer, that is, plead to the initial offer that was offered by the Prosecutor.

The Prosecutor has indicated that the initial offer is no longer available. The initial offer was plea to felony four, possession of a dangerous ordinance, or weapon under disability, without the firearms specification, or the prior offense of violation specification.

Mr. Noble has indicated that he'd be willing to enter a plea to one of those charges.

The Prosecutor has indicated since this is the day of trial, that that offer is not still available.

MR. PLASSARD: The State has indicated that the offer of a plea to a F-4 is not available. The offer that is now available is a F-4 with a specification plea to a prior offense of violence, but excluding the firearm specification with the three years actual incarceration, which I think is reasonable on the day of trial.

THE COURT: The Court will adjourn and we will have you sign the waiver of counsel.